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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

COASTLINE RE HOLDINGS CORP., Plaintiff and Respondent, v. MICHAEL CUNNINGHAM, Defendant and Appellant.	C076994 (Super. Ct. No. 153737)

Appellant Michael Cunningham obtained a $5 million loan for his business, Oroville Self Storage, LLC (Oroville), from Affinity Bank (Affinity). Affinity subsequently failed and the Federal Deposit Insurance Corporation (FDIC) arranged for respondent Coastline RE Holdings Corp. (Coastline) to assume Affinity's assets.

Following a nonjudicial foreclosure, Coastline moved for summary judgment. Cunningham cross-moved for summary judgment, arguing the common law sham guaranty doctrine barred Coastline's claims. According to Cunningham, Affinity instructed him to form Oroville as an administrative convenience and told him that structure would not affect his anti-deficiency protections.

The trial court granted Coastline's motion for summary judgment, finding the sham guaranty doctrine is preempted by federal statutory protections applicable to institutions that purchase a failed bank's assets from the FDIC. Cunningham appeals, arguing these protections do not apply unless they are raised in the pleadings by the party asserting the defense; where the agreement is void *ab initio*; and if the defense is not based on an "agreement." We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 2007 Cunningham and John O'Dea arranged to purchase property on which to build a self-storage facility.[1] The duo applied for a construction loan from Affinity. As part of the negotiation, Affinity required them to complete credit applications specifying them as the borrowers.

Affinity employees instructed Cunningham and O'Dea to form a new limited liability company as an entity to hold title to the property for the loan as an "administrative convenience" for the bank. Affinity employees advised them this arrangement would not alter the substance of the loan and that the bank considered Cunningham and O'Dea to be the borrowers. Cunningham and O'Dea formed Oroville and informed Affinity that the "sole purpose of Oroville . . . is to acquire the land and develop a 130,000 sq. foot self storage facility."

Affinity loaned Oroville $5,176,500 to finance construction. As security for the loan, Oroville supplied a promissory note, a deed of trust on the property, and assignment of rents. In addition, Oroville executed a "Construction Loan Agreement" by which

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[1] O'Dea also filed a cross-motion for summary judgment and opposition. However, he is not a party to this appeal. The trial court noted O'Dea's arguments closely tracked Cunningham's.

Oroville promised that it would furnish executed guaranties of the loan in favor of Affinity and those guaranties would be signed by O'Dea and Cunningham as guarantors.

Cunningham and O'Dea each signed a commercial guaranty stating they "absolutely and unconditionally guarantee[ ] full and punctual payment and satisfaction of the indebtedness." The guaranties identify Cunningham and O'Dea as the guarantors and Oroville as the borrower. In addition, the guaranties state that Cunningham and O'Dea waive any protection from Code of Civil Procedure section 580d, which protects borrowers from liability for any unpaid loan balance after the nonjudicial foreclosure sale of the loan's real estate collateral.

In 2009 Affinity failed and Pacific Western Bank assumed the Oroville loan from the FDIC under a purchase and assumption agreement. In 2010 Oroville defaulted. Pacific Western Bank notified Cunningham and O'Dea of the default and demanded payment, which was not forthcoming.

In 2011 Pacific Western Bank filed a complaint alleging claims for (1) judicial foreclosure, as to Oroville; (2) specific performance, as to Oroville; (3) breach of guaranty, as to O'Dea; (4) breach of guaranty, as to Cunningham; (5) breach of contract, as to Oroville, and (6) injunctive relief, as to all the parties. The bank alleged it purchased Affinity's assets, including the Oroville loan, from the FDIC; that Oroville executed the promissory note, assignment of rents, and deed of trust; and that Cunningham and O'Dea guaranteed Oroville's obligations.

While the suit was pending, Pacific Western Bank assigned its interest in the promissory note and guaranties to its wholly owned subsidiary, Coastline. Coastline nonjudicially foreclosed on the real property securing the note in December 2011. According to the trustee's deed, the unpaid debt at the time of sale exceeded the sale price by several million dollars.

Subsequent to the nonjudicial foreclosure, Coastline applied for right to attach orders and for issuance of writs of attachment as to Cunningham and O'Dea. Both opposed the applications on the grounds the claims were barred by the sham guaranty defense. The court denied the applications, finding "The arguments and evidence submitted by Cunningham do tend to establish that the guarantors, in this case, were actually the borrowers who signed as guarantors at the behest of the lender. They were not separate parties." Based upon that finding, the court denied the writs of attachment.

After the nonjudicial foreclosure, Coastline stated Oroville was no longer liable on the loan and the judicial foreclosure action was moot. Coastline dismissed the causes of action against Oroville.

Coastline moved for summary judgment. Coastline claimed Cunningham and O'Dea signed guaranty agreements, that neither satisfied the deficiency on the loan, and that Coastline fully performed and had been damaged in the amount of the deficiency plus interest, for a total of $3,430,196.95.

Cunningham and O'Dea cross-moved for summary judgment, arguing the common law sham guaranty doctrine barred Coastline's claims. Cunningham alleged Affinity instructed him to form Oroville as an administrative convenience and advised him that this would not affect his anti-deficiency protection.

In its opposition to Cunningham's motion, Coastline argued the sham guaranty doctrine is preempted by federal statutes applicable to the FDIC and to institutions that purchase a failed bank's assets from the FDIC. Coastline also argued that even if the sham guaranty doctrine was not prevented, Cunningham had failed to show as an undisputed fact that he and O'Dea were the true borrowers.

Cunningham, in his reply, objected to the late assertion of the preemption defense on the grounds that the matter was not within the scope of the pleadings and Coastline failed to raise the issue previously in the litigation.

Following a hearing and supplemental briefing on the preemption issue, the court denied Cunningham and O'Dea's motions for summary judgment and granted Coastline's motion. The court observed that Cunningham's evidence "would be sufficient to create a question of fact for the jury on the sham guaranty defense," but that title 12 United States Code section 1823(e) preempted the defense and compelled judgment for Coastline.[2]

Cunningham objected to Coastline's proposed order on the court's ruling. Cunningham argued the order did not include a ruling on the disputed issue of damages and requested a hearing. Coastline argued there was no dispute. In reply, Cunningham stated the court did not consider that before the nonjudicial foreclosure, Coastline expressed a willingness to accept a lesser amount and then refused to accept Cunningham's tender.

The court entered an order granting summary judgment for Coastline and denying Cunningham's motion for summary judgment. The court also scheduled a hearing on damages.

Following the hearing, the court determined that the "motion to establish damages was really unnecessary" because the amount of damages was undisputed at the time of the summary judgment proceeding and the issues raised by Cunningham were not before the court and were not disputed when it granted the motion. Subsequently, the court entered judgment against Cunningham for $3,923,796.85 plus $1,041.35 per day in interest from May 20, 2014, to June 20, 2014. Cunningham filed a timely notice of appeal.

DISCUSSION

I

Standard of Review

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826,

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[2] O'Dea subsequently settled the claim against him and was dismissed from the case.

844.) The moving party, whether plaintiff or defendant, initially bears the burden of making a "prima facie showing of the nonexistence of any genuine issue of material fact." (*Id.* at p. 845.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) "Thus, if a plaintiff who would bear the burden of proof by a preponderance of the evidence at trial moves for summary judgment, he must present evidence that would require a reasonable trier of fact to find any underlying fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Ibid.*, italics omitted.) Once the moving party has met its burden, the burden shifts to the opposing party to show the existence of a triable issue of material fact. (Code Civ. Proc., § 437c, subds. (a), (p).)

We review de novo the record and the determination of the trial court. First, we identify the issues raised by the pleadings, since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts negating the opponent's claims and justifying a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable issue of fact. (*Salas v. Department of Transportation* (2011) 198 Cal.App.4th 1058, 1067; *Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 290.)

II

Sham Guaranty Defense

California's anti-deficiency laws, codified in Code of Civil Procedure sections 580a through 580d and section 726, reflect a legislative policy strictly limiting the right to recover deficiency judgments where the amount of the debt exceeds the value of the security. (*Cadle Co. II v. Harvey* (2000) 83 Cal.App.4th 927, 932. (*Cadle*).) The legislation was established for a public reason and cannot be contravened by a private agreement. (*Valinda Builders, Inc. v. Bissner* (1964) 230 Cal.App.2d 106, 112.)

A guarantor may expressly waive the protections of the antideficiency laws. (*Mariners Sav. & Loan Assn. v. Neil* (1971) 22 Cal.App.3d 232, 235-237.) However, courts refuse to permit lenders to circumvent the statutes that classify the true borrowers as guarantors. "[T]o collect a deficiency from a guarantor, he must be a true guarantor and not merely the principal debtor under a different name. The protections afforded debtors under the antideficiency statutes cannot be subverted by artifice [citation], and a substantial body of law has developed to protect the principal debtor against personal liability in cases in which the principal debtor purports to take on additional liability as a guarantor." (*Cadle, supra*, 83 Cal.App.4th at p. 932.)

In his motion for summary judgment, Cunningham argued he was not the true guarantor, but the borrower, and therefore Coastline was prohibited from collecting the deficiency judgment against him. The trial court considered Cunningham's purported undisputed facts and the applicable law.

The court noted, under Civil Code section 2787, a guarantor is one that agrees to answer for the debt of another, and so cannot be the borrower under a different name. (*River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1420-1421.)

Cunningham argued he met the *River Bank* factors: Affinity requested formation of Oroville, Oroville was not capitalized, the sole members of Oroville were Cunningham and O'Dea, Affinity did not investigate Oroville's finances but only that of Cunningham and O'Dea, Oroville had no credit history, and other than the borrowed funds, Cunningham and O'Dea provided the only funds that went into Oroville.

The court determined: "The arguments and evidence submitted by Cunningham do tend to support the theory that the guarantors in this case were actually the borrowers. This evidence would be sufficient to create a question of fact for the jury on the sham guaranty defense." However, the court also noted that the original lender, Affinity, failed and was taken into receivership by the FDIC: "This brings into play certain federal legislation." Accordingly, we turn to this federal legislation.

III

Title 12 United States Code Section 1823(e)

When a federally insured bank fails, the FDIC can either liquidate the bank and pay depositors their insured amounts, or arrange for another bank to purchase and assume the failed bank's assets. Public policy favors the purchase and assumption alternative, which minimizes the FDIC's losses, expands the purchasing institution's opportunities at low risk, and protects depositors. (*Webb v. Superior Court* (1990) 225 Cal.App.3d 990, 1001 (*Webb*).)

Given these options, the FDIC must decide how to proceed in the wake of a bank's failure by analyzing the cost of paying off a bank's insured deposits versus the cost of a purchase and assumption transaction. The FDIC's decision must be made " 'with great speed, usually overnight, in order to preserve the going concern value of the failed bank and avoid an interruption in banking services.' " (*Langley v. FDIC* (1987) 484 U.S. 86, 91 [108 S.Ct. 396] (*Langley*); *Federal Deposit Ins. Corp. v. Merchants Nat'l Bank of Mobile* (11th Cir. 1984) 725 F.2d. 634, 638.)

However, the FDIC cannot make a reliable evaluation if the failed bank's records contain notes that are subject to undisclosed conditions. The FDIC can conduct a speedy and accurate inventory only if it can rely on the failed bank's records in evaluating the worth of the bank's assets, and it must be able to disregard secret oral agreements that impair the value of those assets. (*Langley, supra*, 484 U.S. at pp. 91-92; *Federal Deposit Ins. Corp. v. O'Neil* (7th Cir. 1987) 809 F.2d. 350, 353.)

The Supreme Court in *D'Oench, Duhme & Co. v. FDIC* (1942) 315 U.S. 447 [62 S.Ct. 676] held that any agreements tending to "deceive the creditors or the public authority" are not enforceable against the FDIC if they would impair the value of an asset the FDIC acquired from a failed institution. (*Id.* at p. 460) Such a rule " 'prevents those who give notes to federally insured institutions from raising defenses based on side agreements made with officers of failed institutions regarding the enforceability of promissory notes.' " (*Webb, supra*, 225 Cal.App.3d at p. 995.) It allows regulators to accurately appraise an institution's assets by allowing regulators to rely on the assets' face value. (*Harrison v. Wahatoyas* (10th Cir. 2001) 253 F.3d 553, 558.)

Title 12 United States Code section 1823(e) (hereafter section 1823(e)), which codified and expanded *D'Oench*, bars the use of extrinsic agreements to diminish or defeat the FDIC's interest in an asset in a failed bank, unless the documents meet a series of requirements. A failed bank's pre-receivership agreement is not enforceable against the FDIC unless it meets the following criteria: It must be (1) written; (2) executed by the failed bank and the obligor contemporaneously with the failed bank acquiring the asset; (3) approved by the failed bank's board of directors or loan committee and reflected in the minutes; and (4) continuously an official record of the failed bank. (Section 1823(e).) The protections of *D'Oench* and section 1823(e) extend to the institutions that purchase a failed bank's assets from the FDIC. (*Weber v. New West Federal Savings & Loan Assn.* (1992) 10 Cal.App.4th 97, 105 (*Weber*).)

The court in *RTC Mortgage Trust v. Shlens* (1998) 62 Cal.App.4th 304, rejected a borrower's attempt to assert state law defenses and affirmed summary judgment in favor of the lender. The court found section 1823(e) allows federal and state bank examiners to rely on a bank's records in evaluating the worth of a bank's assets, prevent debtors from profiting from fraudulent insertion of new terms, and avoid imposing inequitable losses on insurers, taxpayers, or creditors. (*RTC Mortgage*, at p. 316.) In essence, section 1823(e) precludes claims that a document means something different than what it says on its face. (*Weber, supra*, 10 Cal.App.4th at p. 108.)

The Agreement Between Cunningham and Affinity

In opposing Coastline's summary judgment motion, Cunningham argued that section 1823(e) did not apply because there was no "side agreement." Instead, the sham guaranty defense applies as a matter of law based on all the circumstances underlying the loan transaction.

The trial court disagreed, finding "the theory underling Defendant's sham guaranty defense does constitute a side agreement, because it relies on an understanding between the parties which does not appear from the face of the operative documents. Certain statements asserted both in Cunningham's Points & Authorities in support of his motion and in his Declaration although not included in his Separate Statement of Undisputed Facts, further support this interpretation. Two of these assertions are that 'representatives of Affinity Bank instructed John O'Dea and me to form a new limited liability company as the entity to hold title to the Collateral for this business loan as an "administrative convenience" for Affinity Bank' and 'Affinity Bank represented that the structure of utilizing the limited liability company has no effect on the bar against deficiency after non-judicial foreclosure.' These statements tend to indicate that defendant Cunningham's theory arises out of an alleged 'side agreement.' "

We agree with the trial court. After Affinity failed and the FDIC was appointed receiver, Pacific Western Bank agreed to assume Affinity's deposits and loans. Oroville's construction loan, identifying Cunningham as guarantor, was included in the transaction. Oroville subsequently defaulted. Pacific Western Bank filed suit to enforce the guaranties and Cunningham argued his guaranty was unenforceable under the sham guaranty doctrine.

As the court pointed out, Cunningham's sham guaranty defense depends upon a series of assertions. Cunningham contends Affinity instructed him to form Oroville as a matter of administrative convenience, assuring him he would be considered the borrower and not lose his rights under the antideficiency laws. Cunningham further claims he formed Oroville based on Affinity's instructions and that he understood based on Affinity's advice that Oroville would not alter his rights. In support, Cunningham relies on documentation of the loan negotiations with Affinity and Affinity's abbreviated investigation in to Oroville's, Cunningham's, and O'Dea's finances.

However, the loan documents identify Oroville as the borrower and Cunningham as the guarantor. Cunningham "absolutely and unconditionally guarantee[d] full and punctual payment" of the loan and expressly waived any protection from borrower antideficiency protection.

The agreement Cunningham alleges existed with Affinity is precisely the type of side agreement section 1823(e) was designed to guard against. The trial court correctly concluded 12 United States Code section 1823 applied and bars Cunningham's assertion of the sham guaranty defense, reasoning: "Although there may be some ambiguity created by certain documents generated during the application and negotiation process, the FDIC and its successors are entitled to rely upon the final agreement between the parties. That agreement consists of the note and deed of trust, and includes the guaranties signed by the individual defendants."

Waiver

Cunningham argues that Coastline waived its section 1823(e) defense by failing to raise the issue in its complaint or the summary judgment moving papers. The trial court rejected this argument: "The Court finds, however, that the response to Defendant's Motion for Summary Judgment is an appropriate time to raise this issue, and further that the issue has been raised, albeit without specific mention of 12 USC § 1823, in the general allegations at paragraph 1 of the Complaint setting out the FDIC involvement after failure of the original lending institution."

However, Cunningham argues under *California Concrete Co. v. Beverly Hills Savings & Loan Assn.* (1989) 215 Cal.App.3d 260 (*California Concrete*), Coastline waived section 1823(e) by failing to specifically plead it. We find *California Concrete* distinguishable.

In *California Concrete*, the defendant savings and loan sought to assert section 1823(e) as an affirmative defense against the plaintiff subcontractor to avoid its promise to reimburse the subcontractor for work performed. (*California Concrete, supra*, 215 Cal.App.3d at pp. 263, 269.) The court acknowledged amendment of pleadings is to be liberally allowed in the interests of justice, but found the failure to raise a particular defense at the earliest possible time may result in a waiver of that defense. (*Id.* at p. 272)

After reviewing several cases which found waiver after a defendant failed to plead a specific defense, the court held: "Here, Beverly Hills Savings was involved in this action for about two years before it raised 12 United States Code section 1823 as a defense. It waited a year after filing its answer to the second amended complaint before raising this defense, then it did so not by seeking leave to amend its answer to add the defense (which would have required it to explain why it had not asserted the defense in its original answer, and why California Concrete would not be prejudiced if it were allowed to amend), a procedure which would have then given California Concrete some time to investigate the facts and law related to the defense, but instead by raising the defense 'offensively' in a motion for summary judgment. Then, when California Concrete objected to this use of an unpleaded affirmative defense, rather than withdrawing its motion and seeking leave to amend its answer, it chose to stand upon its answer as pled and to force California Concrete to undertake the time and expense involved in responding to the motion for summary judgment and later in prosecuting an appeal. Given these facts, we hold, as a matter of law, that Beverly Savings waived the defense provided by section 1823." (*California Concrete, supra*, 215 Cal.App.3d at p. 273.)

Here Coastline is not the defendant and did not plead section 1823(e) as an affirmative defense. Instead, the defendant, Cunningham, pled the affirmative defense of a sham guaranty. In response, Coastline asserted section 1823(e).

In addition, in *California Concrete* the defendant savings and loan did not allege any FDIC takeover or other federal involvement which would trigger section 1823(e) in its answer. (*California Concrete, supra,* 215 Cal.App.3d at p. 272.) Instead, the defendant stated only it was the successor in interest of another institution, giving no information which would alert the plaintiff to the applicability of section 1823(e). (*California Concrete*, at pp. 270-271.) The court found the defendant's characterization of its position would have lulled the plaintiff into believing the defendant would not be entitled to assert the section 1823(e) defense. (*California Concrete*, at pp. 271-272.)

Cunningham also cites *Webb* in his waiver argument. In *Webb*, the court found no waiver since the defendant invoked section 1823(e) at the earliest possible time. In addition, "Moreover, the tone of the opinion in *California Concrete* implies that the court based its ruling in part on its finding that the savings and loan had tried to mislead the plaintiff by not timely raising the defense. There is no factual basis for such a finding in this case." (*Webb, supra*, 225 Cal.App.3d at p. 1003.)

Here, as the trial court noted, Coastline's complaint alleged sufficient facts to alert Cunningham that section 1823(e) could apply. The complaint states Coastline purchased Cunningham's loan "in a purchase and assumption agreement with the Federal Deposit Insurance Corporation (FDIC), which was appointed as Receiver for Affinity after it was closed on August 28, 2009 by the California Department of Financial Institutions." Accordingly, we find no waiver.

In a related argument, Cunningham contends the trial court erred in considering section 1823(e) because Coastline failed to plead the statute in either the complaint or its summary judgment motion. Coastline moved for summary judgment arguing Cunningham failed to perform his obligations under the loan guarantee. Cunningham opposed the motion and filed a cross-motion asserting the affirmative defense that his guarantee was unenforceable. Coastline then countered with section 1823(e).

Cunningham argues summary judgment proceedings are confined to the issues raised in the pleadings, citing several cases in support. However, section 1823(e) stems from issues raised in the pleadings: Coastline sought to enforce the guarantee pled in the complaint and Cunningham sought to interpose the sham guarantee defense. Section 1823(e) was not outside the pleadings or improperly raised in summary judgment.

The Underlying Agreement

Cunningham also argues section 1823(e) does not apply where the underlying agreement was void ab initio and that he did not rely on a side agreement within the meaning of the statute. We find neither argument persuasive.

According to Cunningham, section 1823(e) does not permit enforcement of a void asset such as a sham guaranty. In support, Cunningham relies on *Langely*. In *Langely* the borrower asserted the defense of fraud in the inducement in response to a collection action by the FDIC. The Supreme Court rejected the theory as unsupported by section 1823(e). (*Langley*, *supra*, 484 U.S. at p. 93.)

In dicta, the Supreme Court noted that section 1823(e) is inapplicable where the defense would render the instrument void rather than merely voidable: "Respondent conceded at oral argument that the real defense of fraud in the factum—that is, the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents, [citation]—would take the instrument out of [section] 1823(e), because it would render the instrument entirely void, [citation] thus leaving no 'right, title or interest' that could be 'diminsh[ed] or defeat[ed].' [Citation]. Petitioners have never contended, however, nor could they have successfully, that the alleged misrepresentations about acreage or mineral interests constituted fraud in the factum. It is clear that they would constitute only fraud in the inducement, which renders the note voidable, but not void. [Citations.] The bank therefore had and could transfer to the FDIC voidable title, which is enough to constitute 'title *or* interest' in the note. This conclusion is not only textually compelled, but produces the only result in accord with the purposes of the statute. If voidable title were not an 'interest' under [section] 1823(e), the FDIC would be subject not only to undisclosed fraud defenses but also to a wide range of other undisclosed defenses that make a contract voidable, such as certain kinds of mistakes and innocent but material misrepresentations." (*Langley, supra*, 484 U.S. at pp. 93-94.)

Cunningham's argument proposes a broad reading of the dictum in *Langley*, contending the case holds that section 1823(e) does not bar any defense that would render an instrument void. However, subsequent courts have declined to address whether the defense of fraud in the factum is barred. (*Resolution Trust Corp. v. Kennelly* (9th Cir. 1995) 57 F.3d 819, 822.) In *Templin v. Weisgram* (5th Cir. 1989) 867 F.2d. 240 (*Templin*), the court stated it was reluctant "to create, on the basis of dictum, an exception to section 1823(e) for conduct that is without doubt precisely the type of conduct to which the section was meant to apply." (*Templin*, at p. 242.) In addition, the court reasoned that "an acknowledgement of what one party in [*Langely*] conceded as to the defense of fraud in the factum certainly does not rise to the level of a dispositive holding, and arguably does not even rise to the level of indicating, however tentatively, the Court's views on the issue." (*Ibid.*)

Cunningham attempts to cobble together a variety of cases to support his assertion that the dicta from *Langley* prevents the assertion of a section 1823(e) defense against a void asset. Under Cunningham's reasoning, since a sham guaranty is void, Coastline cannot invoke section 1823(e). We disagree. The *Langley* dictum refers to fraud in the factum; it did not purport to consider other defense that might render an instrument void. Moreover, the blanket rule Cunningham proposes would effectively undermine the purpose of section 1823(e), which the court in *Langley* cautioned against. Such an interpretation would subject the FDIC and banks that purchased the assets of failed banks to a multitude of undisclosed defenses, including defenses based on alleged secret agreements.

Fraud in the factum, considered by *Langley*, does not involve proof of any side agreements; instead, a party must show that as a result of another party's actions, the party signed a document without full knowledge of the character or essential terms of the document. (*Templin*, *supra*, 867 F.2d at p. 242) The court in *Templin* considered *Langley* and determined: "Given the focus of section 1823(e), it is the manner in which an instrument is proven to be void, not the conclusion that the instrument is void, that determines whether it is within the statute." (*Templin*, at p. 242.) Under this analysis, whether an agreement comes within the purview of section 1823(e), "can be established only by reference to a side agreement in which all parties voluntarily participated, [in those cases] the reasoning and legislative intent underlying section 1823(e) apply with full force." (*Templin*, at p. 242.) This narrow exception does not apply in the present case. Cunningham failed to allege any independent act invalidating the guaranty.

Cunningham also argues his sham guaranty defense does not rely on an agreement within the meaning of section 1823(e). The trial court disagreed, finding Cunningham's defense "relies on an understanding between the parties which does not appear from the face of the operative documents." However, Cunningham concedes no authority supports his argument. We do not find the trial court erred in finding Cunningham's sham guaranty defense relies on his assertion that there was a side agreement that differs from what appears on the loan documents relied upon by the FDIC.

IV

Damages

Finally, Cunningham contends the trial court erred in granting summary judgment despite acknowledging factual issues remained as to damages that must be resolved by an evidentiary hearing. Since a factual dispute remained, the trial court should have denied Coastline's summary judgment motion.

The record undercuts Cunningham's claim. In its summary judgment motion, Coastline set forth the damages: "$3,430,196.95 as of January 29, 2013, plus an additional $1,041.35 per day thereafter in interest." In his opposition, Cunningham did not dispute this damage calculation, but argued the guaranty was barred by the sham guaranty defense. After the court's ruling and in response to Coastline's proposed order, Cunningham disputed the damage calculation. The trial court agreed to hold a hearing to address damages.

Subsequently, the parties stipulated to continue the proposed hearing on damages during settlement negotiations. The court obliged and continued the hearing. After the breakdown in settlement negotiations, Coastline moved to establish damages in the same amount as calculated in the summary judgment motion.

The court found the motion to establish damages was not necessary "because the motion for summary judgment decided all of the issues involved in the case. It was undisputed that the amount of the damages was $3,430,196.95." The court found the damage issue "was undisputed when the summary judgment motion was decided."

The trial court originally agreed on a damages hearing after granting summary judgment based on Cunningham's statement that triable issues existed. However, the trial court subsequently concluded the amount of damages had not been in dispute. We find no error.

DISPOSITION

The judgment is affirmed. Coastline shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

RAYE, P. J.

We concur:

BLEASE, J.

ROBIE, J.